SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 257

ED. C. WRIGHT,

Petitioner,

vs.

BOARD OF PUBLIC INSTRUCTION FOR THE COUNTY OF BROWARD, STATE OF FLORIDA.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I

The Opinion of the Court Below

The opinion of the Circuit Court of Appeals for the Fifth Circuit was rendered April 6, 1945 (11209, pp. 14-21), and is reported as *Wright* v. *Board*, 5 Cir., 148 F. 2d 367. A petition for rehearing or clarification (11209, pp. 22-26) was denied May 4, 1945 (11209, p. 27).

II

Statement of Jurisdiction

A statement of the grounds on which the jurisdiction of this Court is invoked is contained in the foregoing Peti-

tion (pp. 9-11), and in the interest of brevity, is adopted as a part of this brief.

III

Statement of the Case

A statement of the case is contained in the foregoing Petition (pp. 1-9), and in the interest of brevity, is adopted as a part of this Brief.

IV

Specification of Errors

The Court of Appeals erred in the following respects:

1. In affirming the order of the District Court.

2. In deciding that the District Court possesses "discretion" to adjudge whether or not Petitioner can recover on his bonds and appurtenant coupons, or either, and whether or not he should be released from the injunction perpetually restraining the commencement of actions on securities affected by the plan of composition, notwithstanding the fact that the plan had been "fully completed with no provision therein to refund" the securities, "nor to pay, nor to compose, his indebtedness," and "irrespective of any present inability to include" the securities "in a plan of composition which has been fully completed."

V

Argument in Support of Petition

POINT I

The decision sought to be reviewed is in conflict with the decisions of the Circuit Court of Appeals for the Second Circuit in *In re M. D. Mirsky & Co., Inc.*, 32 F. 2d 676 (certiorari denied 280 U. S. 579), and *Seedman* v. *Friedman*, 132 F. 2d 290, the decision of the Circuit Court of Appeals for the

Eighth Circuit in *Central States Life Ins. Co.* v. *Koplar Co.*, 85 F. 2d 181, and the decision of the Circuit Court of Appeals for the Fifth Circuit in *Green* v. *City of Stuart*, 135 F. 2d 33 (certiorari denied 320 U. S. 769, rehearing denied 320 U. S. 813).

In *In re M. D. Mirsky & Co., Inc., supra*, the Court decided that in composition proceedings under former § 12, the bankrupt's offer was "to pay the creditors scheduled, and no others, * * * the bargain between the bankrupt and his creditors" being "fixed by the order of confirmation," and because the claims of two creditors had not been scheduled, they were not affected by the confirmed plan, for which reason the court of bankruptcy lacked jurisdiction to allow or disallow the claims, and the creditors could "at once resort to the bankrupt's assets," which reverted "to him upon confirmation of the composition."

Chapter IX of the Bankruptcy Act stems from former § 12.[8] A different test is prescribed to determine whether or not securities are "affected" by a plan under Chapter IX,[9] but the cited decision conflicts with the decision sought

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[8] *Ashton* v. *Cameron Co., W. Imp. Dist.*, 298 U. S. 513, *U. S.* v. *Beekins*, 304 U. S. 27, *American United Mut. L. Ins. Co.* v. *Avon Park*, 311 U. S. 143.

[9] "The term 'security affected by the plan' means a security as to which the rights of its holder are proposed to be adjusted or modified materially by the consummation of a composition agreement." § 82, 5th definition.

"The 'plan of composition,' within the meaning of this chapter, may include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through issuance of new securities of any character, or otherwise, and may contain such other provisions and agreements not inconsistent with this chapter as the parties may desire." § 83(a), 3rd paragraph.

"No creditor shall be deemed to be affected by any plan of composition unless the same shall affect his interest materially, and in case any controversy shall arise as to whether any creditor or class of creditors shall or shall not be affected, the issue shall be determined by the judge, after hearing, upon notice to the parties interested." § 83(a), 4th paragraph.

to be reviewed, because the former holds that a court of bankruptcy lacks jurisdiction to allow or disallow unaffected claims, whereas the latter holds not only that such jurisdiction exists, but also that the court of bankruptcy has jurisdiction to adjudge whether or not the holder can recover on the unaffected securities, "irrespective of any present inability to include" them "in a plan of composition which has been fully completed." (11209, p. 19).

In *Seedman* v. *Friedman, supra,* the Court decided that the term "affected by" in § 369 of the Bankruptcy Act, means "provided for by," and although a claim against the estate could result from the making, after confirmation of an arrangement, and the later rejection of a contract for the sale of the debtor's assets, the bankruptcy court nevertheless lacked jurisdiction to approve or disapprove the contract, because the possible claim was not "provided for by the arrangement." That decision conflicts with the decision sought to be reviewed, because the former holds that a court of bankruptcy lacks jurisdiction to adjudicate, and enforce or extinguish, rights flowing from an obligation unaffected by the plan, whereas the latter holds that such jurisdiction does exist (11209, pp. 18-21).

In *Central States Life Ins. Co.* v. *Koplar Co., supra,* the Court applied the provision in former § 77B(b)(10) prescribing the test to determine whether or not a creditor was "affected" by a plan of reorganization, which provision, with minor changes in language, was reenacted as the first sentence in § 107 of the present Act, and is identical, in legal effect, with the comparable provisions in §§ 82 and 83(a), governing compositions by public debtors. The decision was that because the plan of reorganization did not disturb the security held by a creditor, and the value of the security was greater than the amount of the indebtedness secured, the creditor was not affected by the plan, and could not be permitted to participate in the proceeding.

That decision conflicts with the decision sought to be reviewed, because the latter holds that the owner of the unaffected indebtedness not only is permitted to participate, but also is required to submit his rights for adjudication, and enforcement or extinguishment, by the court of bankruptcy (11209, pp. 18-21).

In *Green* v. *City of Stuart, supra,* the Court applied §§ 82 and 83(a) of the Bankruptcy Act, prescribing the test to determine whether or not a security is "affected" by a public debtor's plan of composition. The decision was that because two creditors were not required to abate "their indebtedness one whit, or in any respect" abandon or modify "any right they have to enforce it," the plan "did not purport to compose their indebtedness," and because "any applied plan affects only those within its compass," the claims of the two creditors were unaffected, and would "stand with reference to the city and to the debts composed just as they stood before the acceptance of the plan," for which reasons the two creditors were neither necessary nor proper parties to the proceeding, and could not be permitted to participate in it. The decision sought to be reviewed obviously conflicts with the cited earlier decision by the same Court of Appeals.

Point II

The questions presented are important and controlling jurisdictional questions governing not only the administration of public debtor compositions under Chapter IX of the Bankruptcy Act, but also corporate reorganizations under Chapter X, and arrangements under Chapter XI, and have not been, but should be, settled by this Court.

If a court of bankruptcy is invested with jurisdiction, in a municipal composition proceeding, to adjudge, and enforce or extinguish, the rights of holders of securities that were not affected by the fully executed plan of composition,

it is obvious that the same jurisdiction exists in corporate reorganizations and arrangements. The pertinent provisions of Chapter IX are so similar to the corresponding provisions of Chapters X and XI that the existence of the jurisdiction cannot be affirmed in one of the three characters of proceeding, and denied in either of the other two.

In view of the consequences of *stare decisis,* the effect of the decision sought to be reviewed is more far-reaching than appears superficially. The decision can be relied on as precedent establishing that in municipal compositions, corporate reorganizations, and arrangements, the jurisdiction of courts of bankruptcy is much broader and more extensive than the Bankruptcy Act appears to confer, and authorizes the adjudication, and enforcement or extinguishment, after the plan has been confirmed and fully executed, of claims and securities concerning which the plan did not propose nor provide that the rights of the holders be adjusted or modified in any manner.

Because these important jurisdictional questions have not been settled by this Court, and are of wide application, counsel believes and urges that this Court should settle them by reviewing the decision of the Court of Appeals.

Point III

A court of bankruptcy is not vested with jurisdiction to adjudge the validity or invalidity of securities that were not affected by the fully executed plan of composition, to adjudge whether or not there can be any recovery, or the extent to which there may be a recovery, on such securities, and to render and coerce satisfaction of a money judgment on them, or to perpetually enjoin their enforcement.

§ 83(e) of the Bankruptcy Act confers on the Judge jurisdiction to confirm, by interlocutory decree, the plan in a municipal composition proceeding, if he is satisfied that the plan meets the tests there prescribed; and provides that

if he is not so satisfied, he shall enter an order dismissing the proceeding. The same section also provides that "before a plan is confirmed," it may be changed or modified, if the changes or modifications are approved by the Judge and accepted in writing by the debtor. § 83(f) provides that the interlocutory decree shall become and be binding on "all creditors affected by the plan," when the securities or other consideration to be delivered under the terms of the plan shall be made available to the creditors, and that, thereupon, the court shall enter a final decree discharging the debtor from "all debts and liabilities dealt with in the plan," and determining "that the plan is binding upon all creditors affected by it." The only injunctive jurisdiction conferred by Chapter IX is limited to restraining the commencement or prosecution of actions on "securities affected by the plan." § 83(c)

The jurisdiction of a court of bankruptcy, in a municipal composition proceeding, obviously is strictly limited to disapproving, or approving and carrying out, a proposed composition.[10] The sole and single purpose of the jurisdiction is to permit public debtors and their consenting creditors to compose the indebtedness "affected" by the plan of composition.[11] There is in Chapter IX no provision conferring on a court of bankruptcy jurisdiction to adjudge, and enforce or extinguish, the rights of holders of securities that were unaffected by the fully executed plan. What then, is the source of the jurisdiction? Counsel does not know, and neither the District Court nor the Court of Appeals pointed to it.

Should the District Court, sitting as a court of bankruptcy, decide that Petitioner is entitled to recover on the bonds and appurtenant coupons, or either, what relief

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[10] *U. S.* v. *Beekins*, 304 U. S. 27, *Leco Properties* v. *Crummer*, 5 Cir., 128 F. 2d 110, *Ware* v. *Crummer*, 5 Cir., 128 F. 2d 114.

[11] *Green* v. *City of Stuart*, 5 Cir., 135 F. 2d 33.

could it grant? Could it enter a declaratory judgment merely adjudicating that Petitioner is entitled to recover, and remitting him to the State Court for that purpose? Could it go further, and enter a money judgment against the Board? If so, it necessarily would have ancillary jurisdiction to coerce satisfaction of the judgment. The only methods would be to order that money in the official custody of the Board be used for that purpose, or that taxes be levied, collected, and applied in satisfaction. In either event, would not the court of bankruptcy thereby restrict and interfere with the control of the Board "over its fiscal affairs," in a manner and to an extent not authorized nor provided for by the plan? [12]

If the District Court, sitting as a court of bankruptcy, lacks jurisdiction to enforce any rights that Petitioner may have, is it invested with jurisdiction to extinguish them, by perpetually enjoining their enforcement? Can it compel Petitioner to litigate an issue on which, if he is successful, the Court can grant him no relief, but if he is unsuccessful, his rights will be extinguished and lost? It is a strange doctrine that requires him to litigate his rights in a court that cannot enforce, but can extinguish them.

If the District Court lacks jurisdiction to adjudicate the validity or invalidity of the securities, it is both elementary and fundamental that Petitioner's former corporation was never under a duty to be on guard against, nor to challenge, nor to appeal from, a void finding of invalidity. Therefore, the former corporation was not under a duty to except to the Master's Report, nor to present "such" exceptions to the Judge, nor to appeal from the

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[12] *Ashton* v. *Cameron Co. W. Imp. Dist.*, 298 U. S. 513, *U. S.* v. *Beekins*, 304 U. S. 27, *Leco Properties* v. *Crummer*, 5 Cir., 128 F. 2d 110, *Ware* v. *Crummer*, 5 Cir., 128 F. 2d 114, *Green* v. *City of Stuart*, 5 Cir., 135 F. 2d 33.

"order" [13] that the bonds and appurtenant coupons were not refundable and the holder could not recover on them. Since there was no duty to take any one or more of those procedural steps, the failure to take any or all count not "reveal" a "lack of vigilance," and could not justify a refusal to release Petitioner from either the interlocutory or perpetual injunctions restraining actions on securities affected by the plan—if the effect of either injunction is to restrain an action on Petitioner's securities.

The Court of Appeals distinguished between Petitioner's bonds and the appurtenant coupons. (11209, pp. 18-21). It held that the District Court could modify its injunction to the extent of permitting Petitioner to sue for the "principal" of the bonds, but if he seeks to collect the coupons, he has the burden of explaining the inconsistencies and of establishing the integrity and consequent equities of his position. (11209, pp. 20-23). The distinction is unfounded and cannot be justified. If the bonds were unaffected by the plan, the coupons also were unaffected, even though formerly asserted to have been the property of Roberts, under a transfer deemed colorable, because the plan was equally silent concerning both the bonds and coupons. It embodied no proposal concerning either, and did not provide that the rights of the holders be annulled, cancelled, or otherwise extinguished, nor that they be adjusted or modified in any manner. Absent any such provision, the coupons were unaffected, irrespective of who held or claimed to hold them, and regardless of any purpose for which they were sought to be used.

Point IV

A court of bankruptcy cannot exercise, by consent, a jurisdiction that was not conferred by either the Congress or the fully executed plan.

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[13] It was a "finding," not an order (9596, pp. 388, 394).

The subject matter of a proceeding under Chapter IX is the "composition agreement," comprised of the plan and acceptances by creditors. Bankruptcy Act, §§ 82 and 83. That subject matter includes all securities "affected" by the plan; and the holders of such securities are necessary parties to the proceeding. But the subject matter does not encompass any security that is unaffected by the plan; and the holders of unaffected securities are neither necessary nor proper parties.

Petitioner's former corporation, and Roberts, were necessary parties in their respective capacities as holders of other securities affected by the plan, but were neither necessary nor proper parties in their several capacities as holders of unaffected bonds and appurtenant unaffected coupons. In those capacities, they were as much strangers to the proceeding as if neither had held affected securities. Consequently, their attempts to submit claims on unaffected bonds and appurtenant unaffected coupons did not confer jurisdiction of either the unaffected securities or the persons of their holders. And because Petitioner's motion pertained only to unaffected securities, he was never, and is not now, either a necessary or proper party, and his motion did not confer jurisdiction of either his unaffected securities or his person.

The Court of Appeals held that in being forced to litigate the question of "recovery" in the composition proceeding, instead of in a separate action of which the District Court would not have jurisdiction, Petitioner "is getting what he asked." (11209, p. 18). That statement is not strictly accurate. His motion was for the dissolution of any injunction restraining him from bringing an action on his securities, or in the alternative, that he be permitted to litigate their "validity" in the composition proceeding. (10607, pp. 36-37). He did not ask permission to litigate the question of "recovery" in the court of bankruptcy.

The alternative prayer undoubtedly was ill advised. However, the composition proceeding had progressed so far toward extinguishing Petitioner's rights that counsel was desperate as to remedy, and uncertain of the law, with the result that he besought the court of bankruptcy, in the alternative, to exercise a jurisdiction with which he now believes it has never been invested. The subsequent decisions, two by the District Court (10607, pp. 44-45; 11209, pp. 6-9) and two by the Court of Appeals,[14] have resolved neither the desperation nor uncertainty, but counsel does confidently submit that if the court of bankruptcy lacked jurisdiction of the securities, Petitioner did not have the power to confer it.[15]

Point V

By deciding that the District Court possesses "discretion," in a municipal composition proceeding, to adjudge whether or not Petitioner can recover on securities that were not affected by the fully executed plan of composition, and whether or not he should be released from an injunction perpetually restraining the commencement of actions on securities affected by the plan, the Court of Appeals has so far sanctioned a departure from the accepted and usual course of judicial proceedings in a court of bankruptcy, as to call for the exercise by this Court of its power of supervision.

Counsel believes and urges that the argument under Points I to IV, inclusive, *supra,* demonstrates that this proposition is sound. The meat of the argument is that to

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[14] *Wright* v. *Board,* 5 Cir., 142 F. 2d 577; *Wright* v. *Board,* 5 Cir., 148 F. 2d 367.

[15] *Vallely* v. *Northern F. & M. Ins. Co.,* 254 U. S. 348; also *Cutler* v. *Rae,* 7 How. 729; *The Lucy* v. *U. S.,* 8 Wall. 307; *People's Bank* v. *Winslow,* 102 U. S. 256; *Minnesota* v. *Northern Securities Co.,* 194 U. S. 48; *Fraenkl* v. *Cerecedo,* 216 U. S. 295; *Exporters of Mfrs.' Products* v. *Butterworth-Judson Co.,* 258 U. S. 365; *Stratton* v. *St. Louis S. W. R. Co.,* 282 U. S. 10.

require Petitioner to litigate his rights in a Court that cannot enforce, but can extinguish them, so far sanctions a departure from the accepted and usual course of judicial proceedings as to call imperatively for the exercise by this Court of its power of supervision.

Respectfully submitted,

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